

## SUPREME COURT OF WISCONSIN

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Case No.: 98-2710

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Complete Title  
of Case:

Audrey Guzman, Nicanor Guzman, Jessica Guzman, a minor, and Steven Guzman, a Minor, by their Guardian ad Litem,  
Plaintiffs-Respondents  
v.  
St. Francis Hospital, Inc., American Continental Insurance Company and Wisconsin Patients Compensation Fund,  
Defendants-Appellants,  
St. Francis Hospital,  
Defendant-Third-Party Plaintiff,  
James Sullivan, M.D., Physicians Insurance Company of Wisconsin, Richard Fitzpatrick, M.D., and Southeastern Emergency Medical Services, S.C.,  
Third-Party Defendants-Appellants,  
XY & Z Insurance Company,  
Third-Party Defendant.

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ON BYPASS FROM THE COURT OF APPEALS

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Opinion Filed: May 2, 2000  
Submitted on Briefs:  
Oral Argument: April 5, 2000

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Source of APPEAL  
COURT: Circuit  
COUNTY: Milwaukee  
JUDGE: Patricia D. McMahon

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JUSTICES:  
Concurred:  
Dissented:  
Not Participating:

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ATTORNEYS: For defendants-appellants, St. Francis Hospital, Inc. and American Continental Insurance Company, there were briefs (in the court of appeals) by *John A. Nelson, Timothy W.*

For defendant-appellant, Wisconsin Patients Compensation Fund, there were briefs (in the court of appeals) by *Steven J. Caulum and Bell, Gierhart & Moore, S.C., Madison*, and *William H. Levit, Jr., Michael B. Apfeld, and Godfrey & Kahn, S.C., Milwaukee*, and oral argument by *Michael B. Apfeld*.

For the third-party defendant-appellant, James Sullivan, M.D., there were briefs (in the court of appeals) by *Paul Kelly, Amy Doyle and Schellinger & Doyle, S.C., Waukesha*.

For the third-party defendant-appellant, Richard Fitzpatrick, M.D., there were briefs (in the court of appeals) by *Lori Gendelman, Jeffrey J.P. Conta and Otjen, Van Ert, Lieb & Weir, S.C., Milwaukee*.

For the third-party defendant-appellant, Southeastern Emergency Medical Services, S.C., there were briefs (in the court of appeals) by *Mary Lee Ratzel, Peter F. Mullaney and Peterson, Johnson & Murray, S.C., Milwaukee*.

For the third-party defendants-appellants there was oral argument by *John S. Skilton and Foley and Lardner, Madison*.

For the plaintiffs-respondents there was a brief (in the court of appeals) by *Ted M. Warshafsky and Warshafsky, Rotter, Tarnoff, Reinhardt & Bloch, S.C., Milwaukee*, and *Edward E. Robinson and Cannon & Dunphy, S.C., of counsel, Brookfield*, and oral argument by *Ted M. Warshafsky*.

An amicus curiae brief was filed by *David M. Skoglund, and Aiken & Scoptur, S.C., Milwaukee*, on behalf of the

An amicus curiae brief was filed by *Richard H. Middleton, Jr.*, *Ned Miltenberg*, and the *Association of Trial Lawyers of America*, Washington, D.C., and *Merrick R. Domnitz* and *Domnitz, Mawicke & Goisman, S.C.*, Milwaukee, on behalf of the Association of Trial Lawyers of America.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 98-2710

STATE OF WISCONSIN

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IN SUPREME COURT

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Audrey Guzman, Nicanor Guzman, Jessica Guzman, a minor, and Steven Guzman, a minor, by their Guardian ad Litem,

Plaintiffs-Respondents,

v.

St. Francis Hospital, Inc., American Continental Insurance Company and Wisconsin Patients Compensation Fund,

Defendants-Appellants,

St. Francis Hospital,

Defendant-Third-Party Plaintiff,

James Sullivan, M.D., Physicians Insurance Company of Wisconsin, Richard Fitzpatrick, M.D., and Southeastern Emergency Medical Services, S.C.,

Third-Party Defendants-Appellants,

XY & Z Insurance Company,

Third-Party Defendant.

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FILED

MAY 2, 2000

Cornelia G. Clark  
Clerk of Supreme Court  
Madison, WI

APPEAL from an order of the Circuit Court for Milwaukee County, Patricia D. McMahon, Judge. *Order granting bypass vacated and cause remanded to the Court of Appeals.*

¶1 PER CURIAM. The court is equally divided on whether to affirm or reverse the order of the circuit court for Milwaukee County. Chief Justice Abrahamson, Justices Bablitch and Bradley would affirm. Justices Wilcox, Crooks and Sykes would reverse. Justice Prosser did not participate.

When a certification or bypass results in a tie vote by this court, the better course of action is to vacate our decision to accept certification or bypass and remand the cause to the court of appeals. State v. Richard Knutson, Inc., 191 Wis. 2d 395, 396-97, 528 N.W.2d 430 (1995) (remanding to court of appeals on a tie vote on certification); State v. Elam, 195 Wis. 2d 683, 684-85, 538 N.W.2d 249 (1995) (restating rule but declining to remand to court of appeals on a tie vote on bypass because court of appeals had previously decided issue).

Accordingly, we vacate our order granting bypass and remand to the court of appeals.

*By the Court.*— Order granting bypass vacated and cause remanded to the court of appeals.

